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REVERSALS IN THE FEDERAL CONSTITUTIONAL AMENDMENT PROCESS: EFFICACY OF STATE RATIFICATIONS OF THE EQUAL RIGHTS AMENDMENT

With the Equal Rights Amendment[1] nearing the number of ratifications required[2] for inclusion in the Constitution, both opponents and proponents are intensifying pressure on state legislatures to reverse either earlier ratification or rejection. One state has already passed a resolution rescinding ratification and others are known to be considering similar resolutions.[3] Such state action presents important questions concerning how the votes of rescinding states and states which ratify after votes of rejection will be counted at the close of the ratification period.

The conventional assumption is that once a state has ratified a proposed amendment to the Constitution, that act is irreversible. It is also believed that a state may reconsider its rejection of an amendment, and change its vote to the affirmative at any time within the ratification period set by Congress.[4] However, the validity of these assumptions has never been definitively determined by the Supreme Court. Although the Court addressed reversal issues in the leading case of *Coleman v. Miller*,[5] the ambiguous language of that decision left the legal status of these

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1. Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 2d Sess. (1972); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

2. As of April, 1973, 30 of the 38 states necessary had ratified. 1 WOMEN'S RIGHTS L. REP., Spring, 1973, at 104.

3. Nebraska has rescinded; Idaho, Tennessee and Kansas are among the states considering similar action. Letter from J. William Heckman, Counsel, Subcommittee on Constitutional Amendments, Senate Committee on the Judiciary, to State Senator Shirley Marsh, Nebraska State Senate, Feb. 20, 1973, on file with the *Indiana Law Journal* [hereinafter cited as Opinion Letter]; Letter from Donald E. Knickrehm, Idaho Assistant Attorney General, to Patricia L. McDermott, Member of House of Representatives, State of Idaho, Jan. 24, 1973, on file with the *Indiana Law Journal;* Letter from Robert H. Roberts, Tennessee Assistant Attorney General, to Victor H. Ashe, Tennessee State Representative, Mar. 13, 1973, on file with the *Indiana Law Journal;* Letter from Vern Miller, Kansas Attorney General, to Ruth Luzatti, Member of Kansas House of Representatives, Feb. 13, 1973, on file with the *Indiana Law Journal.*

4. Interview with J. William Heckman, Counsel, Subcommittee on Constitutional Amendments, Senate Committee on the Judiciary, by telephone, October 23, 1973; *see* letters cited note 3 *supra.*

5. 307 U.S. 433 (1939). *Coleman* dealt with the question of ratification after previous rejection. *See also* Chandler v. Wise, 307 U.S. 474 (1939). *Chandler* was a companion case to *Coleman* which presented the converse situation of withdrawal of ratification and was dismissed for lack of a justiciable question.

assumptions still in doubt.[6] Therefore, the effectiveness of reversals by state legislatures of their earlier actions concerning the Equal Rights Amendment is uncertain.

There is a critical need for this uncertainty to be eliminated. Proponents and opponents of this amendment and future proposed amendments need reliable guides for their lobbying strategies. In addition, state legislatures which may consider reversing prior resolutions on proposed constitutional amendments should be able to reliably predict the efficacy of such a course, so that they might avoid possibly futile actions. The rules by which any proposed amendment is to be ratified must be reliable and stable. Indeed, article V, which governs the amendment process, was designed to ensure such orderly change to the Constitution. It would be ironic if this article should itself be subject to uncertainty. This note examines the sources of the ambiguity in the law governing the ratification process and attempts to suggest avenues toward a much needed resolution.

SOURCES OF AMBIGUITY

Article V

Article V of the Constitution states in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .[7]

Determining the efficacy of a ratification which has been passed after a vote of rejection, or the efficacy of a ratification which a state is purporting to rescind, requires interpretation of the words "when ratified" in article V. Three interpretations have been suggested.[8] First, under the *Chandler v. Wise* theory, the initial action of the state legislature concerning a proposed amendment may be considered conclusive and binding on future legislatures, even if it is an act of rejection.[9] Second, accord-

6. *See* text accompanying notes 16-19 *infra*.

7. U.S. Const. art. V.

8. L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 70-72 (1942) [hereinafter cited as ORFIELD].

9. 307 U.S. 474 (1939). According to Professor Orfield although treating both acceptance and rejection as conclusive is logically consistent and would somehow protect minority rights, this position has received little support. *See* ORFIELD, *supra* note 8, at 70.

ing to the "Kansas view," an original vote of rejection may be regarded as not conclusive, although an original vote of ratification would be.[10] Third, under the "lottery theory," neither rejection nor ratification may be considered as final until three-fourths of the states have ratified and the amendment adopted.[11] Historically, the predominant position has been that of the "Kansas view."[12] However, because the Supreme Court declared portions of the ratification process to be political questions in *Coleman v. Miller*[13] and left the issue to Congress, the continued validity of this historical position is open to question.

Coleman v. Miller

Coleman involved a challenge to a ratification of the Child Labor Amendment.[14] The Kansas Supreme Court had upheld the state legislature's ratification which had been passed over a previous rejection.[15] The facts in *Coleman* presented the Supreme Court with the question of whether a state, having rejected an amendment, could later ratify it.[16] The Court stated:

> the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question. . . .[17]

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10. Coleman v. Miller, 146 Kan. 390, 71 P.2d 518 (1937), *aff'd on other grounds*, 307 U.S. 433 (1939). The argument supporting this theory is that the Constitution creates only the positive power to ratify. Ratification will therefore exhaust the power granted, but failure to ratify will leave it intact to be exercised at any time within the period set by Congress. It follows from this view of the powers under article V that ratification once given cannot be rescinded. H. AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION, H.R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, at 299-300 (1897); *see* W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 329a (1929); J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS §§ 576-84 (1887) [hereinafter cited as JAMESON].

11. The term designating this theory is original. Professor Orfield seems to favor the position which is based on the argument that ratification should not be more final than rejection. He states:

> [T]here are even stronger practical arguments. It is more democratic to allow the reversal of prior action. A truer picture of public opinion at the final date of ratification is obtained. No great confusion is likely to result from such a rule. . . .

ORFIELD, *supra* note 8, at 72. Orfield does not seem to comprehend the practical difficulties this proposed procedure would entail.

12. *See* notes 3 & 4 *supra*. *See also* text accompanying notes 22-24 *infra* (discussion of congressional precedent).

13. 307 U.S. 433, 450 (1939).

14. H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).

15. Coleman v. Miller, 146 Kan. 390, 71 P.2d 518, *aff'd on other grounds*, 307 U.S. 433 (1939).

16. Coleman v. Miller, 307 U.S. 433, 447 (1939). Two other questions, not relevant to the subject of this note, were also presented.

17. 307 U.S. at 450. Since *Coleman* did not involve the situation presented by a state's attempt to rescind ratification, it could be argued that attempted withdrawal could

However, the opinion is confusing and contradictory because it does not stop there.[18] The Court arguably speaks to the merits, citing the traditional congressional pattern of treating ratification, but not rejection, as binding on a state.[19] It is uncertain from the Court's language whether it was approving the congressional precedent on legal grounds or whether it was merely noting its acceptance by the political branches. Despite this ambiguity, commentators have generally assumed that *Coleman* is a political question holding[20] and that it therefore provides no judicial precedent for the conventional understanding[21] of the meaning of "when ratified" in article V. Thus, whatever validity these assumptions may have is drawn from congressional precedent.

CONGRESSIONAL PRECEDENT

During the ratification process for the fourteenth, fifteenth and nineteenth amendments, states attempted to reserve both earlier ratifications and rejections. Yet, there was an almost complete lack of explicit discussion by Congress of its own precedent during the ratification process for these amendments. Both congressional action and inaction during these periods are consistent with the view that ratification, but not rejection, is binding. Further, congressional behavior is not consistent with the other two possible interpretations of the article V term "when ratified."[22]

During the adoption of the fourteenth amendment, Congress was involved in several steps of the ratification process.[23] However, the

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not properly have been held a political question. But logically, there is no reason to distinguish between reversal of ratification or ratification over previous rejection. This logic is supported by the approach of the *Coleman* Court which dealt with both types of reversal as if they raised the same legal issue. *Id.*

18. Dowling, *Clarifying the Amending Process,* 1 WASH. & LEE L. REV. 215, 219 (1940) [hereinafter cited as Dowling]. N. SMALL, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 799-803 (1964) [hereinafter cited as CORWIN because it is popularly known by the name of the original compiler, Edward S. Corwin].

19. 307 U.S. at 450.

20. *See* Clark, *The Supreme Court and the Amending Process,* 39 VA. L. REV. 621, 635 (1953) [hereinafter cited as Clark]; Dowling, *supra* note 18, at 215; Opinion Letter, *supra* note 3.

21. *See* note 4 *supra* & text accompanying.

22. *See* notes 9-11 *supra* & text accompanying.

23. This itself may have been a break with precedent. Among the first remarks which appear in the record concerning the question of adoption is the assertion by Senator Sumner that "in times past it has been the habit to leave this question to the Secretary of State, who has made an official certificate on the subject. . . ." CONG. GLOBE, 40th Cong., 2d Sess. 453 (1868) [hereinafter cited as 40TH CONG.]. Senator Sumner is likely to be dependable on the question of prior practice in this instance as he disagreed with it and was urging the Senate to pass a joint resolution proclaiming the amendment adopted. His joint resolution was referred to the Judiciary Committee with-

record yields only one discussion on the question of whether it is within the power of a state under the Constitution to reverse prior action concerning ratification. The occasion was receipt by the Senate of an Ohio resolution withdrawing that state's earlier approval of the fourteenth amendment.[24] Among the three senators who spoke, there was no consensus on the permissibility of reversals. The Ohio resolution was merely referred to the Committee on the Judiciary, in effect killing the resolution.[25]

With no direction from Congress, when it appeared that three-fourths of the states had ratified, the Secretary of State issued a proclamation, certifying:

> [I]f the resolutions of the legislatures of Ohio and New Jersey ratifying the . . . amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States . . . then the . . . amendment has been ratified . . . and so has become valid, to all intents and purposes, as a part of the Constitution of the United States.[26]

The next day, without debate, both houses passed a concurrent resolution declaring that the fourteenth amendment should be promulgated. The resolution included in the list of ratifying states both those which had attempted to withdraw ratification (Ohio and New Jersey), as well as those which had ratified over prior rejection (North Carolina and South Carolina).[27] The Secretary of State then issued the definitive proclamation declaring the amendment adopted.[28]

During the ratification period for the fifteenth amendment, the debate was much livelier, due to the fact that the readmitted southern states were resuming their representation in Congress. Understandably, the discussions lacked unanimity. More telling was the final inaction of Congress. A joint resolution for congressional declaration of the ratification of the amendment was referred to, but never re-emerged from, the Committee on the Judiciary.[29] Therefore, there was no formal joint

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out comment on its substance by any other Senator, and no action was taken. *Id.* For the text of the statute authorizing the Secretary of State to so act see text accompanying note 86 *infra.*

24. 40TH CONG., *supra* note 23, at 876-78.
25. *Id.* at 878.
26. 15 Stat. 706-07 (1868).
27. 40TH CONG., *supra* note 23, at 4266, 4270.
28. 15 Stat. 708-11 (1868).
29. CONG. GLOBE, 41st Cong., 2d Sess. 1444 (1869) [hereinafter cited as 41ST

congressional action during this entire ratification period.

The Secretary of State, without congressional direction, proclaimed the amendment ratified.[30] He noted that while New York had sought to withdraw its ratification, Georgia had recently ratified. This brought the number of states to the required three-fourths, regardless of which way New York was counted. An attempt in the House to have the issue referred to a special committee failed[31] and, in the end, no action was taken by Congress to clarify the position of New York. No joint resolution was adopted mandating the Secretary to proclaim ratification as had been done for ratification of the fourteenth amendment.[32] Thus, the Secretary's proclamation stood notwithstanding the action by New York, which is now generally considered to be among those states which ratified the amendment.[33]

When the nineteenth amendment was ratified, it was simply promulgated by the Secretary of State, with no question directed to Congress, although both Tennessee which claimed to have rescinded ratification and West Virginia which had ratified over prior rejection were counted among the ratifying states.[34] It seems that the precedent for ignoring reversals was by then well set since no action of any kind was proposed or taken in Congress during this ratification period.

Congressional behavior during these three ratification periods has created precedent consistent only with the theory that ratification is binding, but rejection is not.[35] Had the Congress espoused the *Chandler v. Wise* position,[36] it would have geen necessary to declare invalid the ratifications of those states which had first rejected the amendment. Had Congress espoused the lottery theory,[37] it would have been necessary to honor the attempted withdrawals of ratification.

The Value of Congressional Precedent

Having established the substance of congressional precedent on ratification, it is necessary to examine its legal import in order to determine whether legislative precedent can resolve the dilemma for those who need to know the law governing the ratification process.

CONG.].

30. 16 Stat. 1131-32 (1870).
31. 41ST CONG., *supra* note 29, at 2298.
32. *See* note 27 *supra* & text accompanying.
33. Opinion Letter, *supra* note 3, at 4.
34. 41 Stat. 1823 (1920).
35. Chief Justice Hughes reached the same conclusion. Coleman v. Miller, 307 U.S. 433, 450 (1939).
36. *See* note 9 *supra* & text accompanying.
37. *See* note 11 *supra* & text accompanying.

It is understood that no Congress can bind a future Congress. As Professor Black has put it:

> [Based] on the most familiar and fundamental principles, so obvious as rarely to be stated . . . no Congress has the power to bind the consciences of its successors, with respect to grave questions of constitutional law. . . .[38]

Precedents are necessarily less binding than laws since, when change is sought there is no need for formal repeal. In addition, Congress, being elected to represent the people at a particular time, is not as burdened as is the judiciary with the necessity of making its actions appear consistent. However, Congress is apparently cognizant of its own precedents when it confronts issues raised only infrequently, and has accorded them a certain amount of respect in the past.[39]

Regard for congressional precedent permeates the response of the Counsel to the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee to an inquiry from the Nebraska State Senate concerning the permissibility of withdrawing ratification. The Opinion Letter opened:

> Briefly the judicial opinions and, more importantly, the precedents established by the Congress itself make it clear that once a state has ratified an amendment, it has exhausted the only power conferred on it by Article V of the Constitution, and may not, therefore, validly rescind such action.[40]

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38. Black, *Amending the Constitution*, 82 YALE L.J. 189, 191-92 (1972).

39. The most cogent modern example of this practice is the attempt, led by then Representative Ford (D.-Mich.), to impeach Supreme Court Associate Justice Douglas. *See* HOUSE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., FINAL REPORT BY THE SPECIAL SUBCOMM. ON H. RES. 920 (Comm. Print 1970). Despite Representative Ford's assertion "that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," *id.* at 36, the Special Subcommittee took great pains to go back through all past examples of impeachment attempts, to reconcile apparently conflicting precedents, and to test all the charges against the parameters they were able to develop, and concluded that their search had "not disclosed creditable evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense." *Id.* at 349.

40. Opinion Letter, *supra* note 3, at 1. The conclusion is based on the following argument of Judge Jameson:

> The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, "shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several states.* . . ." By this language is conferred upon the States, by the national Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be nullity. But, until so exercised, the power undoubtedly,

The language in *Coleman* was then quoted to the effect that Congress is the final arbitrator of the question of efficacy.[41] The Letter next reviewed congressional precedent. Emphasis was placed on the proclamation of the Secretary of State[42] during the ratification of the fourteenth amendment as clearly posing the issue to Congress of the validity of ratifications which were subsequently rescinded. The congressional response in that case, as well as its response to the same question during the ratification period of the fifteenth amendment, were cited as relevant precedent.[43] The Letter concludes with what is currently the most authoritative statement available on the question of efficacy of ratification.

> Congress . . . has expressed itself quite definitively on this question. It is my legal opinion as Counsel of the Subcommittee on Constitutional Amendments of the United States Senate that once a State has exercised its only power under Article V of the United States Constitution and ratified an Amendment thereto, it has exhausted such power, and that any attempt subsequently to rescind such ratification is null and void.[44]

However, since no Congress can bind a subsequent Congress, reversal of this precedent without prior notice is still a theoretical possibility, if not a practical probability. Judicial intervention may be necessary to prevent this occurrence and provide stability in the amendment process.

Justifying Judicial Intervention

At the end of the seven-year ratification period, the Congress which decides which states have effectively ratified the Equal Rights Amendment will not be the same one which proposed it. It can be argued that the proposing Congress acted under the dominant assumption that ratification, but not rejection, is final. However, while this view of efficacy will not be legally binding on the Congress presented with the question of which state ratifications to honor, citizen lobbyists, state legislators and even members of Congress have relied on the continuing validity of this consistent legislative precedent.[45] A change

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for a reasonable time at least, remains. . . . When ratified all power is expended. Until ratified the right to ratify remains.

Jameson, *supra* note 10, §§ 579-81, at 628-30 (emphasis in original).

41. Coleman v. Miller, 307 U.S. 433, 450 (1939).
42. *See* note 26 *supra.*
43. Opinion Letter, *supra* note 3, at 4. *See* note 26 *supra* & text accompanying.
44. *Id.*
45. *See* authorities cited notes 3 & 4 *supra.*

in procedure by Congress during the ratification period would leave both opponents and proponents of the Equal Rights Amendment in confusion.[46] If such a change should come when the ratification period has ended, it could severely prejudice the legitimate expectations of whichever side ultimately loses.

The courts may well have a role to play in protecting the reliance interests of the citizenry and the states and ensuring that their efforts at orderly change are not disrupted by unexpected action on the part of Congress in reversing a longstanding precedent concerning the proper procedures for ratification. The courts can bring to this precedent the necessary finality to make it a reliable guide to present and future actions concerning constitutional amendment. The question arises, however, whether *Coleman v. Miller*[47] forecloses judicial intervention, or whether *Coleman* can be reinterpreted.

There is a constitutional interest in the stability that the courts could provide. The purpose of the Framers in including article V can only have been to provide for the orderly alteration of the Constitution to ensure its responsiveness to future generations. It is anomalous that a strictly construed political question doctrine might become the instrument for the disorder that would ensue from sudden congressional reversal of its own precedent. Such a use would violate the Supreme Court's articulated purpose for the application of the doctrine, that "a tool for maintenance of governmental order will not be so applied as to promote only disorder."[48]

Legal scholars have long recognized the need for finality in the amendment procedure. One commentator has urged that this goal be achieved solely through the courts:

> [S]ince this is the sort of question which the Supreme Court has often decided, and since there are no insuperable obstacles to reaching an accurate decision, the Court should have taken jurisdiction [in *Coleman*] and settled . . . the question . . . and *that can only be done by the Court.*[49]

Another commentator also argued for stability, but believed *Coleman* mandated that:

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46. Just the possibility of change raises questions of central importance which cannot be answered. Is it worth the effort to try to get a rejecting state to ratify? Is it worth the effort to try to get a ratifying state to reverse and attempt to rescind ratification? If a state has passed a rescinding resolution, is the original ratification to be relied on, or should efforts be mounted for re-reversal? How real is the possibility of change by Congress?

47. 307 U.S. 433 (1939).

48. Baker v. Carr, 369 U.S. 186, 215 (1962).

49. Clark, *supra* note 20, at 649 (emphasis added).

> *The rules must be made by Congress,* unless . . . Congress . . . prefers to leave all questions open for decision if and whenever they may arise in connection with the ratification of any given amendment. But surely the law on such a basic matter as amending the Constitution ought to be known in advance; and the judicial branch has here passed full responsibility over to the legislative.[50]

While stability must be achieved, neither of the polar views of justiciability presented by these commentators will yield the most desirable solution.

The goal for the courts should be to find the middle ground which pays respect to the role of Congress, as sanctioned in *Coleman,* in formulating the rules of ratification, but which at the same time protects the interests of stability and reliance against the possibilty of congressional change in the midst of the ratification process.

Toward a Special Article V Doctrine of Justiciability

Any new judicial approach to article V cases must cope with the holding of *Coleman* that ratification issues are political questions and thus reserved exclusively to Congress for decision.[51] A re-examination should be conducted in light of the modern contours of the political question doctrine which has been more clearly defined since *Coleman.* The current law is derived from *Baker v. Carr*[52] which enumerated the factors to be considered in determining the presence of a political question:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. *Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .*[53]

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50. Dowling, *supra* note 18, at 220 (emphasis added).
51. *See* notes 16-19 *supra* & text accompanying.
52. 369 U.S. 186 (1962).
53. *Id.* at 207 (emphasis added). The following standards, inapplicable here, were also listed in the opinion:

> [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking

The political question doctrine will only be an obstacle to judicial intervention in the ratification process if the issue can be shown to involve either a textually demonstrable commitment to a coordinate branch of government or a lack of judicially managable standards.

Textually Demonstrable Commitment

The language in article V[54] could conceivably give rise to an argument that the powers under it are textually committed to Congress. However, in light of recent redefinition of the term, it would appear difficult to argue that ratification is "textually committed." In *Powell v. McCormack*[55] the Court held that the statement in article I, section 5 of the Constitution, "Each House shall be Judge of the . . . Qualifications of its own Members," was not so complete a textual committment that it prevented the Court from considering issues concerning the seating or expulsion of congressmen.[56] The Court indicated that even if it initially found a textual commitment it would go further and define the scope of the commitment:

> For, as we pointed out in *Baker v. Carr*, . . . "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government. . . is itself a delicate excercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[57]

To accomplish this the Court was willing to go behind the text to review and analyze the historical context in which the controlling phrase was adopted in order to determine the intent of the Framers.[58] The Court's approach in *Powell* made clear that the notion "textual commitment" is far from absolute.

In order to examine to what extent the ratification process has been

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independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

54. *See* text accompanying note 7 *supra*.

55. 395 U.S. 486 (1969).

56. *Id.* at 550. Professor Wechsler had listed article 1, § 5 among the few explicit textual commitments in the Constitution. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959). The text of article 1, § 5 seems much more of a commitment to Congress than the expression "when ratified" from article V which would need to be interpreted in any redetermination of whether ratification is a political question.

57. 395 U.S. at 521.

58. *Id.* at 521-48.

textually committed to Congress, it is necessary to determine the meaning of the phrase "when ratified" by looking to the historical background of article V. During the drafting of the article the most controversial portion was the role Congress would play in proposing amendments.[59] In order to balance that role, the states were given particular prominence in the ratification process.[60]

In view of this concern, there would seem to be no reason to conclude that the Framers intended article V to be within the exclusive control of Congress. No historical reasons appears to exclude the Court from its traditional role of interpretating the Constitution. The Court should be able to determine if the states have followed the correct amending procedure, whether this requires an intrepretation of article V or of congressional statute or precedent.

Judicially Manageable Standards

Just as a textual commitment would indicate the presence of a political question, so also would the finding that there is a lack of judicially manageable standards.[61] Although the Supreme Court encountered little difficulty in determining judicially manageable standards for constitutional interpretation in *Powell v. McCormack*,[62] it seems unlikely that the Court meant to foreclose all future inquiry in constitutional cases into whether judicially manageable standards are available. Should the Court seek a source of standards for article V cases, it would find two possibilities which would not require overruling *Coleman*:[63] (1) an article V doctrine which would evolve a special theory of limited justiciability confining the Court's role in ratification cases to assuring that congressional precedent is not altered in the midst of the amendment process; and (2) a statutory construction theory which would limit the Court's intervention to interpretation of the statute which implements

59. ORFIELD, *supra* note 8, at 2.

60. *Id.* at 61. Likewise, Clark states:

> In view of the apprehension of the writers of the Constitution caused by giving Congress power to propose amendments, [1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 202-203 (1911); 2 *id.* at 629-31] the holding of the *Coleman* case provides an interesting example of the change both in outlook and method of government which has occurred since 1789.

Clark, *supra* note 20, at 651.

61. *See* text accompanying note 53 *supra*.

62. 395 U.S. 486, 549 (1969).

63. Overruling *Coleman* would be unnecessary because the portion of the opinion which found it impossible to fashion judicially manageable standards related solely to the question of the lapse of time since the proposal of the amendment. Coleman v. Miller, 307 U.S. 433, 453 (1939). The absence of standards was not one of the factors which led the Court to conclude that efficacy of ratification was a political question.

article V.[64] Either of these sourses would permit the courts to provide stability to the ratification process while at the same time giving Congress a determinative role in formulating the rules for ratification.[65]

(1) Article V Doctrine

The adoption of this doctrine, which would give the courts a limited role in interpreting article V, would require reinterpreting that portion of *Coleman* which dealt with ratification.[66] Instead of being a pure political question holding, the case may have evidenced the continuation of an implicit doctrine followed by the Court in article V cases. Although Chief Justice Hughes in his opinion for the Court stated that "the question of the efficacy of ratifications by state legislatures. . . should be regarded as a political question,"[67] he reviewed congressional action during the ratification of the thirteenth, fourteenth and fifteenth amendments and then, arguably, came to an actual decision on the merits.

> Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual. . . . This decision by the political departments of the Government . . . has been accepted.[68]

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64. That statute is codified at 1 U.S.C. § 106b (1970).

65. A third possible source of standards would be an independent constitutional construction theory. This theory is not advocated, however, because it would not protect reliance interests. The Court has stated that it does not consider itself bound by the constitutional interpretations of a coordinate branch. Powell v. McCormack, 395 U.S. 486, 549 (1969). Therefore, a court would be free to ignore congressional precedent and adopt any of the three possible interpretations of the article V phrase "when ratified." *See* notes 9-11 *supra* & text accompanying. Another objection to the theory is that it would threaten the separation of powers policies embodied in the political question doctrine. Baker v. Carr, 369 U.S. 186, 217 (1962).

66. It is the language of Chief Justice Hughes, writing the opinion of the Court, that is capable of reinterpretation. It was not a majority opinion, however, and votes of those who joined in Justice Black's concurring opinion were necessary to reach the result. The concurrence is much more clearly a pure political question holding and therefore not capable of such reinterpretation. *See* Coleman v. Miller, 307 U.S. 433, 456-60 (1939) (concurring opinion).

67. *Id.* at 450.

68. *Id.* The Court then stated:

> The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections. . . .
>
> The statute [now codified at 1 U.S.C. § 106b (1970)] presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty.

The conclusion that a historic precedent "has been accepted" seems inconsistent with a political question holding, as was pointed out in the concurring opinion of four of the justices:

> To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree. . . .
>
> The Court here treats the amending process of the Constitution in some respects as subjects to judicial construction, in others as subject to the final authority of the Congress. . . .[69]

Further, it seems unlikely that the Court intended a pure political question holding since it cited several prior Court decisions concerning article V in such a way as to indicate their continuing validity.[70]

The *Coleman* decision, if interpreted as a pure political question holding, must be understood to have reversed a clear trend in which article V questions had been considered uniformly justiciable.[71] In the decade of the Twenties, a great flurry of judicial activity centered around the eighteenth amendment (Prohibition), the nineteenth amendment (Women's Suffrage), and the proposed Child Labor Amendment. Challenges to both the content of the amendments, as well as the procedures by which they had been proposed and ratified, were decided arguably on the merits. These decisions were sufficient to construe the following italicized portions of article V which constitute virtually all of the significant portions of that article:

> The Congress, *whenever two thirds of both Houses shall deem it necessary, shall propose Amendments* to this Constitution, . . . *which* . . . *shall be valid to all Intents and Purposes,*

Id. at 450-51. Again, the opinion seems to say too much to be completely consistent with a political question holding. The statement could be read to construe both the statute, and article V itself as having nothing to do with rejections. This would provide further support for the argument that the *Coleman* holding, as to efficacy of ratification, should be reexamined and reinterpreted to yield a special article V doctrine.

69. *Id.* at 458.

70. The Court's opinion included references to: Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920); National Prohibition Cases, 253 U.S. 350 (1920).

71. CORWIN, *supra* note 18, at 802; Dowling, *supra* note 18, at 215; Clark, *supra* note 20, at 646. Prior to *Coleman*, the only exception to the presumption of justiciability seems to be Luther v. Borden, 48 U.S. (7 How.) 1, 39 (1849) where the validity of adoption of an amendment is alluded to in dicta as a political quetsion. In an even earlier case, Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), questions as to the legality of an amendment has been assumed to be justiciable and the Court ruled on the merits concerning a step in the process of proposal.

> *as Part of this Constitution,* when ratified by the *Legislatures* of three fourths of the several States, or by Conventions in three fourths thereof, as the *one or the other Mode of Ratification* may be proposed by the Congress; . . . .[72]

Hawke v. Smith[73] held that a provision in a state constitution allowing legislation to be approved by referendum was inapplicable to ratification of a constitutional amendment because ratification is not a regular legislative act.[74] In reaching this decision, the Court construed the word "Legislatures" as it appears in article V.[75] This was the first time language within the article was construed by the Court. The holding necessarily implied that the choice of the "Mode of Ratification" could not be altered by state action.

The *National Prohibition Cases*[76] also provided an example of the Court's construction of language in article V. These cases established the principle that "two thirds of both Houses" could be interpreted in terms of congressional quorums rather than the total membership of each house for the purpose of determining whether a proposed amendment was "deem[ed]. . . necessary."[77] These cases also defined "Amendments' to include additions to, rather than merely changes in, matters already included in the Constitution.[78] These two portions of article V seem far more explicitly committed to congressional power by the Constitution than is the phrase "when ratified," the phrase which must be construed to ascertain the efficacy of ratifications.

In *Dillon v. Gloss,*[79] the Supreme Court held that the adoption of the eighteenth amendment was completed as of the date of ratification by the last state required, rather than as of the date of promulgation by the Secretary of State.[80] In so doing the Court necessarily construed the clause "which shall be valid to all Intents and Purposes as Part of this Constitution."

These cases can be interpreted in several ways. First, they can be

72. U.S. Const. art. V (emphasis added).
73. 253 U.S. 221 (1920).
74. *Id.* at 228.
75. *Id.* at 227.
76. 253 U.S. 350 (1920).
77. *See id.* at 386.
78. *Id.*
79. 256 U.S. 368 (1921).
80. The Court's determination resulted in affirming the denial of a petition for a writ of habeas corpus by a defendant who had been convicted of transporting intoxicating liquor. If, as he had argued, the effectiveness of the amendment depended on the date of promulgation, the amendment would not have been in effect at the time of his arrest. *Id.* at 370, 376.

understood as decisions on the merits concerning the meaning of the words of article V which the Court arrived at independent of congressional precedent. This would give the predominant role to the judicial branch in the construction of the article. Second, the cases could be construed as not involving the merits but meaning only that the congressional interpretations were within legislative powers under article V, thus giving the primary role to Congress. Or they may be understood in a third way which yields a cooperative role for the Court and the Congress. This last approach, which shall be called the article V doctrine, views the Court as adopting on the merits past congressional interpretations of article V as definitive constructions of the Constitution.

This third interpretation is the best supported by the evidence. The Court in the article V cases has never contravened a practice adopted by Congress.[81] This is too great a coincidence to be consistent with independent judicial constitutional construction. In addition, none of the pre-*Coleman* article V cases, although not overruled by *Coleman*,[82] appear on their face to be political question holdings consistent with the second approach above. Finally, language in *Coleman* itself goes beyond a pure political question holding and is indicative of acceptance of congressional precedent.[83] Chief Justice Hughes' statement that historic congressional precedent "has been accepted,"[84] was interpreted by Professor Dowling to support this assertion:

> The result of it all seems to be: . . . that the Court considers the law already settled by "historic precedent" to the effect that a state can change its vote from No to Yes (the same precedent refused a change from Yes to No). . . .
>
> [This] itself involves something akin to a decision on the merits. That is to say, when the Court declared that the historic precedent of the Fourteenth Amendment "has been accepted" it was in that very declaration making a pronouncement on the law. . . .[85]

Coleman, viewed as an acceptance of, rather than a deference to, congressional precedent is consistent with the article V doctrine advanced here as a source of judicially manageable standards. Under this doctrine, once a challenge to an amendment procedure is brought before a court, it

81. ORFIELD, *supra* note 8, at 13 n.12.
82. *See* note 70 *supra* & text accompanying.
83. Coleman v. Miller, 301 U.S. 433, 450 (1939).
84. *Id.*
85. Dowling, *supra* note 18, at 219.

will draw the logic for its constitutional interpretation from applicable congressional precedent and declare it henceforth to be the law. The congressional interpretation will thus be endowed with the necessary finality to be a reliable guide to those interested in amending the Constitution, whether they be individual citizens, state legislators or members of Congress itself.

The policies underlying a political question holding are in no way contravened by this doctrine. The role of the legislative branch is preserved by allowing it to interpret article V in the first instance. If congressional precedent on the issue is nonexistent, or should the Court not wish to lock Congress into an interpretation once utilized, it could make clear, as part of the special article V doctrine, that its interpretation will be law only so long as Congress does not pass a prospective general statute changing the amendment rules. Even this lesser role for the Court would protect reliance and stability by preventing congressional change without notice. While the course of judicial action suggested may seem unorthodox, it takes into consideration both the legitimacy of congressional flexibility in the amendment process and at the same time forecloses the possibility of congressional change without warning.

(2) Statutory Construction

As an alternative to applying the article V doctrine as the standard by which to decide ratification questions, the courts could adopt the method of statutory construction, a more conservative source of judicially manageable standards. The only statute concerning the amendment process ever passed by Congress provided as follows:

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes as part of the Constitution of the United States.[86]

As with congressional precedent itself, this statute is consistent only with the theory that rejection can be reversed, but ratification cannot.

86. Act of April 20, 1818, ch. 80, § 2, 3 Stat. 439. The statute was amended in 1951, but the only change was to substitute "General Services Administration" for "Department of State" and "Administrator of General Service" for "Secretary of State." Act of October 31, 1951, ch. 655, § 2(b), 65 Stat. 710, *amending* 5 U.S.C. § 160 (1940) (codified at 1 U.S.C. § 106b (1970)).

The statute gives the Secretary of State (now the Administrator of General Services)[87] authority to act only when an amendment has been adopted. The Secretary's duty is an accounting and publication function with no discretion involved. His power is limited to counting ratifications as they are received from the states and announcing when the required proportion of the states have ratified. There is no provision in the statute for notification of a state's failure to ratify, nor is there any provision for rescinding a notification of ratification after it has been filed with the Secretary. Only once has a Secretary of State sought clarification of whether the ratification of a state attempting to rescind was still in force.[88] Congress responded in the affirmative.[89] By the time of the nineteenth amendment the precedent of ignoring reversals was so well established that the Secretary failed even to mention them in his promulgation.[90] Historic conduct under the statute is consistent solely with the theory which makes both prior rejection and attempted withdrawal null and void, a theory for which it is unnecessary to judge the efficacy of ratifications once official notice has been received.

The pre-*Coleman* article V case of *Leser v. Garnett*[91] in which the Court interpreted the promulgation statute is consistent with this theory. In *Leser,* the nineteenth amendment was challenged on the ground that it was not ratified by the requisite number of states. Tennessee had voted to rescind earlier ratification. West Virginia's ratification was over prior rejection. Both questions concerning the efficacy of ratification were thus squarely presented to the Supreme Court in *Leser.* Justice Brandeis, for a unanimous Court, noted that the questions could be avoided on the ground that two additional states had since ratified the amendment, which arguably made the questions moot.

Nevertheless the opinion declared:

> But a broader answer should be given to the contention. The proclamation by the Secretary certified that. . . the proposed Amendment was ratified by the legislatures of thirty-six states, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States. . . ." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive

87. *See* note 86 *supra.*
88. 15 Stat. 706-07 (1868) (during ratification of the fourteenth amendment).
89. 40TH CONG., *supra* note 23, at 4266, 4270.
90. 41 Stat. 1823 (1920).
91. 258 U.S. 130 (1922).

> upon him, and, being certified to by his proclamation, is conclusive upon the courts.[92]

Thus the Secretary's duty to issue a proclamation of adoption, upon receipt of the requisite number of ratifications, without attempting in any way to judge their merit, was made even clearer. Like congressional precedent itself, the statute evidences only one meaning of the article V words "when ratified." A court could rely on *Leser*[93] and interpret this statute as the congressional decision on the law of ratification which may be held binding until repealed or amended.

The statutory construction approach, like the article V doctrine, would yield judicially manageable standards for determining the law of ratification. Should the courts follow this approach a certain amount of finality would be given to the ratification process upon which concerned citizens and legislatures might rely. At the same time, congressional participation in the process would be recognized. While the law of ratification could still conceivably be changed in the midst of a ratification period by repeal or amendment of the applicable statute, the necessity of formal action by Congress would make the likelihood of reversal of precedent less than if Congress were to remain free to accept or reject state ratifications. Statutory construction would provide greater protection for the interests of reliance and stability than if the courts were to follow a strict political question doctrine, although less than if the courts were to adopt the suggested article V doctrine.

CONCLUSION

The common assumption that ratification of a constitutional amendment is irreversible, but rejection is not, is an open legal question. With ratifications of the Equal Rights Amendment nearing the number required for adoption, there is a crucial need for an authoritative construction of the article V phrase "when ratified." Despite the traditional belief that

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92. *Id.* at 137.

93. The precedential value of *Leser* may be questioned in light of Coleman v. Miller, 307 U.S. 433 (1939). The commentators are divided as to *Coleman's* effect on prior article V cases. *See* Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems,* 39 NOTRE DAME LAWYER 659 (1964); Dowling, *supra* note 18, at 220.

Nevertheless, *Coleman* cited *Leser* for the following proposition:

> The statute [now 1 U.S.C. § 106b (1970)] presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty.

307 U.S. at 451. Thus, it was clear that *Leser* was not overruled since it was cited as authority for at least a portion of the holding.

Coleman v. Miller,[94] as a pure political question holding, precluded Court involvement in the amendment process, there is room for both Court and Congress in interpreting article V. The role of each would be preserved by the Court's adopting either the article V doctrine or the statutory construction theory suggested here. There is no need for the Court to substitute its judgment for that of Congress. Congressional intent is abundantly clear from its own precedent and from the promulgation statute. Either approach would serve the paramount purposes of reliance and stability. Moreover, none of the underlying policy considerations of the political question doctrine would be contravened.

Either approach would yield a firm interpretation that the meaning of "when ratified" in article V allows states to reverse rejection and later ratify, but not to rescind ratification.

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94. 307 U.S. 433 (1939).